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No. 85-1818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD E. LYNG, Secretary of the United States Department of Agriculture, and THE UNITED STATES DEPARTMENT OF AGRICULTURE,

Petitioners,

vs.

THE STATE OF IOWA *ex rel.* THOMAS J. MILLER, Attorney General of Iowa,

and

DANNY GETTLER, *et al.*,

Respondents.

JOINT OPPOSITION TO PETITION FOR CERTIORARI

G. F. HOFFMAN III
Hoffman Law Firm
107 West Ninth Street
Leon, Iowa 50144

Counsel for Petitioners Danny Gettler, et al.

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Bldg.
Des Moines, Iowa 50319
(515) 281-5164

TIMOTHY D. BENTON
Assistant Attorney General

KEVIN M. KIRLIN
Assistant Attorney General

Counsel for Petitioner, The State of Iowa

*Counsel of Record

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture's administrative action to abolish, with respect to farmers devastated by a severe drought in 1983, a statutorily created Congressional disaster program is immunized from judicial review as a matter of law by the "committed to agency discretion" exception of the Administrative Procedure Act.

2. Whether an Administrative Procedure Act action seeking to require the Secretary to comply with federal law is an effort to obtain an injunction against the property of the Commodity Credit Corporation, a non party to the action.

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

The respondents, State of Iowa and several individual farmers, hereby offer the following brief in opposition to the Secretary's petition for writ of

certiorari in the above-captioned matter.

STATEMENT OF THE CASE

In the summer of 1983, a devastating drought hit farmers in the Midwest. For livestock farmers in southern Iowa, it was the worst drought in memory. In the words of Secretary Block, "My evaluation is that it probably is the most severe drought we've had in the last 50 years. The drought of the 1930s may well have been worse, but I'm not convinced necessarily that is the case." See Problems Caused by the Drought Situation; Hearing Before the Committee on Agriculture, House of Representatives, 98th Cong., 1st Sess. (1983) (statement of Secretary John Block) at 3.

Notwithstanding the severity of the drought, the Secretary refused to

provide disaster assistance to livestock producers under three Congressionally established programs. The Livestock Feed Program, or LFP, authorizes the Secretary to make available to drought stricken farmers federally held commodities at advantageous prices. 7 U.S.C. § 1427. The Emergency Feed Program, or EFP, authorizes the Secretary to provide cash assistance to livestock producers in order to preserve herds when natural disasters such as drought have created an emergency for farmers. 7 U.S.C. § 2267. The Special Disaster Payments Program or SDPP, authorizes the Secretary to make cash payments to farmers whose yields on feed grain are devastated by natural disaster. 7 U.S.C. § 1444d(b)(2)(D).

The Secretary has structured the Livestock Feed Program and the Emergency Feed Program through rules published pursuant to the Administrative Procedure Act, 7 U.S.C. § 701 et seq. See 7 C.F.R. § 1475.1-.17 (LFP); 7 C.F.R. § 1475.50-.68 (EFP). Until recently, the Secretary did not promulgate rules regarding the Special Disaster Payments Program.

Notwithstanding requests from the Governor of Iowa and the Iowa Congressional delegation, the Secretary refused to provide any disaster relief under the three programs to Iowa livestock producers who were devastated by the horrible drought. With respect to the Livestock Feed Program, the Secretary simply walked away from his own published rules by refusing to honor them. With respect

to the Emergency Feed Program, the Secretary relied on a rule which purported to terminate benefits under the program after April 8, 1982. 7 C.F.R. § 1475.53. The Secretary further refused to make Special Disaster Payments available to victims of the drought, even though similar payments were made available to farmers in Texas, New Mexico, and Oklahoma who, in 1982, experienced a far, far less serious natural disaster by any objective measure. See U.S.D.A. Needs Objective Criteria for Awarding Special Disaster Payments, Report to the Honorable Berkley Bedell (General Accounting Office) (November 2, 1982) (USDA awards Special Disaster Payments in inconsistent manner) at 4.

After informal efforts to persuade the Secretary to provide assistance under the disaster programs failed, the State of Iowa filed an action under the Administrative Procedure Act challenging the Secretary's refusal to provide disaster assistance to Iowa farmers. Several individual farm families intervened in the action. With respect to the LFP, the plaintiffs claimed that the Secretary was legally required to provide benefits under the rules which he himself promulgated. With respect to the EFP, the plaintiffs attacked the rule which purported to terminate benefits after April 8, 1982, as arbitrary, capricious, and contrary to law. The plaintiffs finally attacked the failure to implement the SDP program as

arbitrary, capricious, and an abuse of discretion under the APA.

The District Court dismissed the action on the ground that there was "no law to apply" in reviewing the Secretary's action. See State of Iowa ex rel. Miller et al. v. Block, Civ. No. 84-356A (August 22, 1984). Pet. App. at 31a-32a. The District Court also held that the State of Iowa lacked standing as parens patriae to litigate the lawsuit. Pet. App. at 26a-30a.

The District Court, however, recognized the harsh impact of the drought on Iowa livestock producers and the inadequacy of the Secretary's response to the emergency. According to the District Court, the Court

> . . . would have no difficulty in finding that the emergency programs actually implemented by the Secretary did not

> provide sufficient relief to the livestock farmers in southeast Iowa who find themselves in precarious financial situations due, at least in part, to the adverse weather conditions of the past three years.

Pet. App. at 33a.

On appeal, the Eighth Circuit held that the anti-injunction provision of 15 U.S.C. § 714b(c), which prevents the imposition of injunctions against the Commodity Credit Corporation, barred the plaintiffs from utilizing the APA to attack the failure of the Secretary to follow his own LFP rules and to attack attacking the purported "termination" rule of the EFP. The Court held, however, that the attack of the plaintiffs regarding the SDP was not barred by the anti-injunction provision, found "ample" law to apply, and reversed the holding of the district court with

respect to the SDP. On remand, the District Court was instructed to note "the close similarity that the plight of Iowa's farmers bears to the disasters contemplated by the statute and its legislative history." State of Iowa ex rel. Miller v. Block, 771 F.2d 347, 355 (8th Cir. 1985). Pet. App. 17a. On the issue of the standing of the State to litigate the action, the Court of Appeals affirmed the District Court. Id. at 352-55, Pet. App. 10a-16a.

On remand from the Court of Appeals, the Secretary filed a motion for remand of the case to the agency for "prompt" rulemaking. See Declaration of Milton J. Hertz, (Exhibit G, Joint Resistance to Application for Stay, A-No. 85-1818) at 3, ¶ 7. On January 27, 1986, the District Court entered an order

remanding the case to the agency for final rulemaking by June 1, 1986.

After the District Court entered its remand order, the State of Iowa and the individual farmer-plaintiffs filed a timely petition for writ of certiorari with this Court seeking review of the decision of the Court of Appeals. State of Iowa et al. v. Lyng, No. 85-1481. In the petition, the State and farmers claim that the Court of Appeals clearly erred when it considered the plaintiffs' action against the Secretary as an action against the CCC. The State and individual farmers argue that the case presents a vintage APA attack on the Secretary for failing to follow his own rules with respect to the LFP. The State and farmer-plaintiffs further claim that their challenge to the

purported termination rule as arbitrary, capricious, and an abuse of discretion is a conventional APA proceeding against the Secretary, not the CCC.

The Secretary also filed a petition for certiorari challenging the Court of Appeals' opinion with respect to the SDP program. The Secretary seeks to confine this Court's review to whether the Secretary has total discretion to implement to SDP no matter how serious the drought or how great the financial hardship on individual farmers and whether the anti-injunction act applies to his decision to refuse to allow SDP payments to Iowa farmers. The Secretary resists consideration of whether the anti-injunction act applies to the plaintiffs' challenges of the Secretary's refusal to follow his own LFP

rules and the plaintiffs' challenge to the Secretary's "termination" of EFP benefits.

With the filing of the petitions for certiorari, the Secretary sought to forestall the rulemaking process that he himself had requested. Notwithstanding his failure to seek a stay from the Court of Appeals as required by Fed. R. App. P. 41(a), the Secretary belatedly sought a stay of what he earlier pledged would be "prompt" rulemaking. The District Court and the Court of Appeals summarily dismissed the request. On May 8, Justice Harry Blackmun entered a temporary stay to protect this Court's jurisdiction pending a response from the plaintiffs. On May 16, Justice Blackmun vacated the temporary stay and denied the motion for stay in all respects.

On May 20, 1986, the Secretary published in the Federal Register a Proposed Rule for the SDPP. See 51 Fed. Reg. 18552 (May 20, 1986). The Proposed Rule establishes a series of sky-high eligibility requirements that must be satisfied before a farmer may obtain benefits.

On June 2, the State of Iowa and the individual farmers filed a lengthy Comment with the Secretary attacking the Proposed Rule, which stated that if the Rule were adopted, it would virtually abolish the program by administrative action. See Comment of State of Iowa, et al., In Re Special Disaster Payment Program Rulemaking, (June 2, 1986) at 46. The plaintiffs were joined in the Comment by the states of Minnesota,

Wisconsin, Illinois, Missouri, Kansas, Nebraska, and North Dakota.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The holding of the Court of Appeals that there is ample law to apply so that judicial review is available to determine whether the Secretary erred in failing to implement the Special Disaster Payments Program is clearly correct.

a. Contrary to the Secretary's argument, he does not have "sole discretion," Petition at 14, to determine when or if to grant benefits under the SDPP. Such an approach would allow the SDPP program to be used as a political slush fund for the disbursement of benefits for partisan political purposes. Instead, Congress created a

program that would insure that farmers received adequate disaster assistance while the Secretary engaged in the painstaking effort of creating a comprehensive program of federal crop insurance to replace disaster aid programs. During the transition period, Congress expected the Secretary to provide disaster payments when he found:

> (i) as the result of drought, flood, or other natural disaster, or other condition beyond the control of the producers, producers on a farm have suffered substantial losses of production either from being prevented from planting feed grains or other nonconserving crop or from reduced yields, and that such losses have created an economic emergency for the producers;
>
> (ii) federal crop insurance indemnity payments and other forms of assistance made available by the federal government to such producers for such losses are insufficient to alleviate such

> economic emergency, or no crop insurance covered the loss because of transitional problems attendant to the federal crop insurance program; and
>
> (iii) additional assistance must be made available to such producers to alleviate the economic emergency.

7 U.S.C. § 1444d(b)(2)(D).

b. The legislative history provides additional law to apply. Senator Heflin was co-author of the Amendment to the Agriculture and Food Act of 1981, now codified at 7 U.S.C. § 1444d(b)(2)(D) which authorized SDP payments notwithstanding the existence of crop insurance. Senator Heflin provided a Congressional committee with what the committee, using language ironically similar to that employed by courts reviewing agency action under the APA, characterized as "some idea of

situations in which the Secretary reasonably could be expected to implement the disaster payments programs." The situations included instances where:

> (1) federal crop insurance excludes coverage for the disaster risk which caused the loss;
>
> (2) there is a lack of understanding of the crop insurance program among producers affected by the disaster;
>
> (3) crop insurance was not adequately sold in the area affected by the disaster, or educational efforts were inadequate;
>
> (4) FCIC used an inaccurate actuarial basis so that a producer affected by disaster was unable to obtain adequate crop insurance coverage.

S. Rep. No. 126, 97th Cong., 1st Sess. (1981), 77-78. This legislative history provides the Court with unusually clear guidance in determining whether the Secretary's failure to implement the

Special Disaster Payments Program was contrary to the will of Congress.

c. The administrative materials related to the SDPP demonstrate beyond question that there is "law to apply" in reviewing the Secretary's actions under the program. In 1982 the Secretary implemented the disaster payments program in Texas but not in Iowa, a discrepancy which led to a United States General Accounting Office (GAO) study of the administration of the SDPP. The GAO had no difficulty finding "law to apply" from the clear Congressional intent of the program. After determining that the purpose of the program was to assist farmers who were the victims of a natural disaster, the GAO found the Secretary's administration of the program to be inconsistent and based

upon subjective factors, United States General Accounting Office, USDA Needs Objective Criteria for Awarding Special Disaster Payments, Report to the Honorable Berkley Bedell, (November 2, 1982) at 14-15 (reprinted at R. 99-100), and recommended that the Secretary develop rules to guide his discretion. Obviously, the GAO found "law to apply" or it would have been unable to reach the conclusion that the program was being arbitrarily administered.

In response to the GAO report, the Secretary adopted a "Report of Committee to Establish Special Disaster Payment Criteria" (R. 105-108). The Secretary's Report established the explicit criteria under which the Secretary is to implement disaster payments under § 1444d(b)(2)(D). This Report was

presented to Congress as "established" policy. See Problems Caused by the Drought Situation: Hearing Before the Committee on Agriculture, House of Representatives, 98th Cong., 1st Sess. 49 (1983) (statement of Everett Rank). The Report plainly furnishes "law to apply" in considering plaintiffs' challenge to the Secretary's refusal to implement the Special Disaster Payments Program.

2. The holding of the Court of Appeals that there is ample law to apply in reviewing the Secretary's refusal to provide SDPP payments to any farmer regardless of financial damage caused by the 1983 drought does not establish a broad precedent but simply applies established precedent to a specific statute.

a. This Court has consistently held that the "committed to agency discretion" exception to judicial review under the APA is to be narrowly construed. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

b. Nothing in Heckler v. Chaney, ___ U.S. ___, 105 S.Ct. 1649 (1985) is to the contrary. This case simply stands for the proposition that the decision whether to launch or not to launch an enforcement action by a civil regulatory agency is not subject to judicial review. The plaintiffs in this case do not challenge an enforcement action by a regulatory agency, but the refusal of the Secretary to make disaster benefits available to farmers contrary to the will of Congress.

3. The anti-injunction provision of 15 U.S.C. § 714b(c) has no applicability to an action against the Secretary seeking to force him to comply with the Congressional mandate to provide Special Disaster Payments under certain situations.

a. Congress vested authority in the Secretary of Agriculture, not the CCC, to determine whether SDPP benefits should be provided. See 7 U.S.C. § 1444d(b)(2)(D).

b. The Commodity Credit Corporation is not a party to this lawsuit.

c. The plaintiffs' dispute is not with the administrators at the Commodity Credit Corporation concerning the management of government-owned property, but with the Secretary of Agriculture

for failing to carry out his statutory mandate under 7 U.S.C. § 1444d(b)(2)(D).

4. The Secretary's claim that the ruling of the Court of Appeals would "displace Congress's preference for a system of crop insurance with an expanded system of cash payments that the Department of Agriculture estimates would run into tens of millions of dollars annually, and potentially into the billions," Petition at 11, is grossly inaccurate.

a. The holding of the Court of Appeals emphatically does not displace the Congressional preference for federal crop insurance. The holding simply requires that benefits be available where federal crop insurance was either inadequate to cover the loss or where

the loss was not covered due to "transitional problems attendant to the Federal crop insurance program." See 7 U.S.C. § 1444d(b)(2)(D)(ii).

b. If the Secretary were able to implement a program of crop insurance that provided adequate coverage for producers and smooth out transitional problems, no payments would be made under the SDPP. See 7 U.S.C. § 1444d(b)(2)(D). Unfortunately, the Secretary did not have such a program in place covering livestock farmers in 1983.

5. The Secretary's real dispute is not with the holding of the Court of Appeals, but with the Congress.

a. In 1981, the Secretary sought to abolish the SDPP. See S. Rep. No. 126,

97th Cong., 1st Sess., at 27, as reprinted in 1981 U.S. Code Cong. & Ad. News 1967, at 1992. Congress insisted, however, that the SDPP be available where federal crop insurance was inadequate or did not cover the loss due to transitional problems. See S. Rep. No. 126, 97th Cong., 1st Sess., at 76, as reprinted in 1981 U.S. Code Cong. & Ad. News, at 2041.

b. After the decision in State of Iowa et al. v. Block was rendered, the Congress retained the SDPP in the 1985 farm bill. See Food Security Act of 1985, Pub.L. 99-198, 99 Stat. 1354, 1400. The Secretary is frustrated because he cannot get the Congress to adopt his notion of the public interest with respect to the SDPP. This Court, however, does not sit to afford the

Secretary political remedies that he is unable to obtain from the Congress.

CONCLUSION

For all the above reasons the Secretary's petition for writ of certiorari in the above-captioned matter should be denied.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164

TIMOTHY D. BENTON
Assistant Attorney General

G. F. HOFFMAN, III
Hoffman Law Firm
107 West Ninth Street
Leon, Iowa 50144

ATTORNEYS FOR PETITIONERS

*Counsel of Record